No. 14,432

(And Consolidated Cases
Nos. 14,432-14,440 and Nos. 14,442 and 14,446.)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DIX BOX COMPANY and BENJAMIN DIX, Doing Business as DIX BOX COMPANY,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEES.

LILLIE & BRYANT, and
WALTER M. CAMPBELL,
668 South Bonnie Brae Street,
Los Angeles 57, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Regulations and Statutes

Textbook

No. 14,432

(And Consolidated Cases
Nos. 14,432-14,440 and Nos. 14,442 and 14,446.)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DIX BOX COMPANY and BENJAMIN DIX, Doing Business as DIX BOX COMPANY,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEES.

Statement of the Case.

By these actions the Government seeks to recover treble the amount of the alleged over-charges in the sale of goods in excess of ceilings established by an alleged regulation of the Office of Price Stabilization. The complaints, drawn pursuant to the provisions of Section 409(c) of the Defense Production Act of 1950, 50 U. S. C. App. Section 2109(c), alleges that the sales took place between May 5, 1952, and January 31, 1953 [R. 5].[1] Judgment was entered for each of the appellees on the grounds that

---

[1]References to the record herein are to be printed transcription of record in No. 14432, *United States v. Dix Box Co., et al.*

(1) the purported regulation is void, and (2) the Government is estopped from enforcing it by reason of the conduct and promises of its duly authorized agents [R. 23-25].

Appellees were each dealers in used agricultural containers in Southern California during the period in question, their operation consisting in buying, reconditioning and selling used wooden agricultural containers [R. 18-19].

The industry is a small one consisting of approximately 20 to 25 dealers [R. 82]. The business done by the appellees represented about 95 per cent of that done in the area during the period in question [R. 82].

Pursuant to authority granted by the Defense Production Act of 1950, ceiling prices for the appellees' sales of used agricultural containers were originally fixed at the highest prices obtained by them between December 20, 1950, and January 19, 1951, as provided by the General Ceiling Price Regulation, 16 F. R. 808 (Jan. 30, 1951), and 5424 (June 8, 1951) [R. 19].

The use of this period as a basis for ceiling prices resulted in inequities, in that the base period fell in a season when business was slack, resulting in different ceiling prices for the individual items for practically every dealer [R. 90]. The principal items in appellees' business consisted of lugs, apple boxes, and lettuce crates [R. 97]. Of these, apple boxes were in an active market and had a competitive price but the others did not. The appellees, therefore, through attorneys, filed a protest with the Office of Price Stabilization complaining that the prices which they had obtained for key items other than apple boxes during this base period did not properly reflect their business [R. 19-20]. In consequence, the OPS issued Order L-117 on June 28, 1951 [Ex. A] setting

revised ceiling prices for certain of the goods sold by the appellees [R. 92-95].

Under date of April 29, 1952, the Office of Price Stabilization purported to issue Ceiling Price Regulation 142 setting ceiling prices so far as appellees were concerned both for their sales and for their purchases of containers for resale [R. 36-38]. Immediately upon learning of the regulation, a committee of the association of business dealers to which appellees all belonged was formed and arranged a meeting with the appropriate officials of the OPS [R. 113-114] and continued to meet with such officials periodically from the early part of May, 1952, until January 20, 1953, when the Office of Price Stabilization in Los Angeles was disbanded and all ceiling prices removed so far as appellees were concerned [R. 21]. During the course of these meetings, it was the consensus of opinion of both the representatives of the trade and of the Government that appellees could not operate except at a loss under Regulation 142 [R. 121, 187, 221, 165, 166-167, 238]. Appellees were advised that it would not be necessary for them to file a written protest, inasmuch as appropriate relief could be given by the local office without the time necessarily incurred by the technical protest described in the Price Procedural Regulations [R. 163, 185, 237]. They were further advised that it would not be necessary for them to hire attorneys [R. 237]. The appellees informed the officials that they would have to either disregard Regulation 142 and continue under Order L-117 or close their doors [R. 121, 195-196]. The Government officials agreed that the dealers could continue under Order L-117 [R. 121, 188, 189, 221]. The dealers therefore continued to operate openly and notoriously under Order L-117, under the sincere belief that they were acting within the law [R. 122, 188, 221].

In formulating Regulation 142, the Director of the Office of Price Stabilization or his represnetatives made no attempt to, nor did they consult with the appellees or their representatives, or with other dealers in the used wooden agricultural container business [R. 20-21]. Regulation 142 materially altered the industry's historical differences between cost and sales prices by reducing the margin thereof [*Cf.* Exs. A, B, C, D, and 1].

In its complaints appellant contended that each of the purchasers of the containers sold and delivered at the original over-ceiling price, purchased the same in the course of his trade or business [R. 5]. The evidence failed to show who the purchasers from appellees were, or what use the boxes purchased were put to, although the largest part of their sales were to truckers, growers, packagers and wholesalers [R. 57, 63-64]. No evidence was introduced as to any individual sale, despite the fact that appellees, pursuant to Government subpoena, produced in Court their sales records, including the names of customers [R. 45, 46, 70].

Questions Presented.

1. Whether Regulation 142 was void and the Court below had jurisdiction so to declare.

2. Whether appellant is estopped by the conduct and promises of the officials of the Office of Price Stabilization under the circumstances of this case.

3. Whether, in the event it is determined that Regulation 142 is valid or that the Court below did not have jurisdiction to declare it void and if the appellant is not estopped, the appellant made out a *prima facie* case entitled it to receive damages in any amount.

ARGUMENT.

I.

CPR 142 Is Void and of No Force and Effect and the Court Below Had Jurisdiction so to Determine.

1. In enacting the Defense Production Act of 1950, and in granting to the President of the United States and his authorized representatives power to promulgate orders and regulations affecting trades and businesses, Congress placed definite restrictions upon the powers granted. It is the contention of the appellees that the Government in promulgating Regulation 142 disregarded three factors required by law and that therefore the Regulation was void and *ultra vires*:

(a) 50 U. S. C. App. Section 2102(d)(4) provides:

> "After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951 to February 24, 1951, inclusive. . . ."

Regulation 142 lowers the prices set forth in L-117 [Ex. A; R. 92-95], which was the price prevailing immediately before the date of issuance of the regulation, and is also, as to many items, below the ceiling price prevailing during the period January 25, 1951 to February 24, 1951, particularly as to the margin between purchase and sales prices [Ex. C].

(b) 50 U. S. C. App. Section 2102(g) provides:

> "The powers granted in this title shall not be used or made to operate to compel changes in the business practices, cost practices or methods, . . . established in any industry. . . ."

A comparison of Regulation 142 [Ex. 1; R. 36-38] with Exhibits C and D demonstrates conclusively the sweeping changes to cost practices and methods as established in the industry. It will be seen that as to all major items the price differential between cost and sales price of merchandise has been narrowed.

(c) 50 U. S. C. App. Section 2104 provides:

> "In carrying out the provisions of this title, the President shall, as far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons subtantially affected by regulations or orders issued hereunder."

It was clearly established and found by the Court below that the Director of the Office of Price Stabilization or his representatives made no attempt to, nor did they consult with the appellees or any other dealers in appellees' line of business [R. 21].

The Government argues in Brief, pages 11-13, that this provision in the Defense Production Act is meaningless by reason of 50 U. S. C. App. Section 2159, which provides that although any regulation issued shall be accompanied by a statement that there has been a consultation with industry representatives and etc., the regulation shall not be invalid by reason of the inaccuracy of said statement. *Norman-Frank, Inc. v. Arnall,* 196 F. 2d 502, is cited in support of the Government's position.

It would seem that there is some confusion on the part of the Government as between the actions necessary to clothe the Administrator with authority to issue a regulation in the first instance and the accuracy of statements made by him in the regulation. In order to give both sections of the act full validity, it would appear that the President or his representatives would have no power to act until he had first complied with the requisite of industry consultation. Then if he subsequently inaccurately stated the extent of such representation, such inaccuracy would not invalidate the act which was originally properly taken.

(d) We believe that if the regulation is void and *ultra vires* that there can be no question of the right of the trial court to refuse to apply it. In this connection, there is a distinction between determining the validity of a regulation, the jurisdiction for which is expressly denied to the district court, and the determination that the regulation is void as in excess and in derogation of power of the Administrator, and that therefore it is nullity which cannot be enforced. (*Granzon v. Village of Lyons,* 89 F. 2d 83, 85.)

(e) Even if it be said that the trial court did not have the power to declare the regulation void, it is clear that it would have the power to interpret it and determine what it means. (*Armour & Co. v. United States,* 102 Fed. Supp. 987, 990.) In that case the court adopted the language of Justice Minton, then a judge of the Seventh Circuit Court of Appeals, who said in *Bowles v. Simon,* 145 F. 2d 334, 337:

> "We do not accept the Administrator's view that he may promulgate a regulation and then place on it

an interpretation which becomes controlling on the courts. The Administrator has not grown to any such stature. The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them. Norweigian Nitrogen Products Co. v. United States, 288 U. S. 294, 325, 53 S. Ct. 350, 77 L. Ed. 796, Bowles v. Nu Way Laundry Company, 10 Cir. 144 F. 2d 741.

"We think the District Court had a right to determine the meaning of these regulations for itself, although it could not, and did not, undertake to pass upon their validity, since that authority resides in the Emergency Court of Appeals and in the Supreme Court. . . ."

It will be observed that by Regulation 142, the purpose of the regulation is stated to be that of raising the basic prices of those in appellees business by 18 per cent. Examination of the provisions of the regulation demonstrates that prices were actually lowered, rather than raised. In the face of this repugnancy between the provisions of the same regulation, the court would clearly have the power to enforce the more liberal construction in appellees' favor and hold that portion of the regulation which sets forth the dollar and cent prices is inapplicable.

(f) It is to be noted that CPR 142 does not, by its terms, revoke the provisions of L-117, with which latter order the appellees admittedly complied. If the two orders are to be given co-existence, then the Court in a proceeding which is penal in nature, as in the instant case, may apply the more liberal of the orders.

II.

Appellant Is Estopped From Enforcing the Provisions of Regulation 142 by Reason of the Acts and Expressions, Express and Implied, by Its Agents.

It seems clear from the evidence and is not seriously attacked by appellant that the OPS representatives at least tacitly encouraged appellees to continue their operations under Order L-117. It is further clear that the Government representatives were directly responsible for the failure of appellees to file a written protest as directed in Price Procedural Regulation [R. 163]. The appellant now contends that it cannot be estopped by the acts of its agents, and that in the absence of written agreements, appellees are without remedy. There can be no quarrel with the general principles of law enumerated in the cases cited by appellant. However, they are distinguishable upon their facts from the instant case.

Estoppel claimed in the instant case is that the OPS personnel relieved the appellees of their obligation to follow CPR No. 142 and waived procedures requiring *written* protests set forth in the Price Procedural Regulation.

The rationale of the cases holding that the Government cannot be estopped by acts of its agents is merely that by estoppel that which is illegal cannot be made legal. The fact that the Government is a party is not a determining factor, since no party can be estopped into a position contrary to law. Misrepresentation does not prevent

either the citizen or the Government from asserting as illegal that which the law declares to be illegal.

Fed. Crop Insurance Corp. v. Merrill, 332 U. S. 380;

United States v. Stewart, 311 U. S. 60;

Wilber National Bank of Oneonta v. United States, 294 U. S. 120.

Acts or omissions of agents lawfully authorized to bind the United States or direct its course of conduct during a particular transaction may estop the Government.

Lindsey v. Hawes, 2 Black, 67 U. S. 554;

United States v. Standard Oil Co. of Calif., 20 Fed. Supp. 427.

It must be considered that an agent acts within the scope of his authority and in good faith until the contrary is shown. The burden of proof that an agent is not acting within the scope of his authority is upon the party asserting it.

The elements of equitable estoppel are all present in the instant case. These requisites as stated in *Pomeroy's Equitable Jurisprudence* (5th Ed. 1941), pages 191-192, are as follows:

1. Conduct amounting to a representation of material facts.

2. Notice of these facts imputed to the party estopped.

3. Ignorance of these facts by the other party.

4. An expectation, at least, by the party estopped that the other party would act upon the conduct, actual reliance and detriment.

III.

The Government Failed to Sustain Its Burden of Proof so as to Entitle Appellant to Any Damages.

(a) *The sales in question were not shown to be other than in the course of trade or business of the purchasers.* The Government predicated its complaints upon the ground that each of the purchasers of the containers in question purchased them in the course of his trade of business [R. 5]. The evidence introduced failed to show whether or not appellees' customers purchased in the course of their trade or business, although the largest part of them were truckers, growers, packagers and wholesalers [R. 57, 63-64].

By statute, the President is authorized to institute suits only if the person who buys the material or service does so for use or consumption *other* than in the course of trade or business, and in the latter instance only if the purchaser has failed to institute action in his own behalf within a statutory period. The pertinent portions of 50 U. S. C. App. Section 2109(c) provides:

> "If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption other than in the course of trade of business may . . . bring an action against the seller on account of the over-charge. . . . If . . . the buyer either fails to institute an action . . . or is not entitled for any reason to bring an action . . . the President may institute such action on behalf of the United States. . . . Any action under this subsection . . . by the President may be

> brought in any court of competent jurisdiction. A judgment in an action for damages . . . under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller."

If it is the Government's theory that all sales were in the course of the trade or business of the purchaser, then no suit would lie for the recovery of over-charges (*United States v. Yaffe,* 113 Fed. Supp. 382, 385-386), nor *contra* as to sales made not in the course of the purchaser's trade or business could recovery be had, unless the Government showed that no suit has been instituted by the purchasers. Appellees admission that they knew of no such suit would hardly be sufficient to supply this necessary allegation.

(b) *No showing that sales were made while Regulation 142 was alleged to be in effect.* The complaints allege [R. 5] and it was stipulated [R. 13-14] that the *sales in question were made from May 5, 1952 to January 31, 1953.* However, it was proved at the trial and found by the Court that *all price ceilings as to the appellees were removed January 20, 1953* [R. 21].

Thus, even assuming Regulation 142 to be enforceable, it ceased as of January 20, 1953, and any sales consummated between January 20 and January 31, 1953 were not subject to its terms. The Government failed to supply the Court with any data whatsoever in this connection. Hence, if the Court had upheld the validity of the order and its enforceability, it would have lacked sufficient data to render a monetary judgment. Again, the Government

subpoenaed the necessary sales records to establish these matters, but did not use them.

(c) *In any event, appellant would not be entitled to triple damages.*

Taking the strongest view against appellees, there can be no question as to the good faith in their dealings, and to the fact that they were led into their position by the acts of responsible Government officials. Triple damages are a matter within the discretion of the trial court. 50 U. S. C. App. Section 2109(c).

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be sustained.

LILLIE & BRYANT, and
WALTER M. CAMPBELL,
Attorneys for Appellees.

February, 1955.